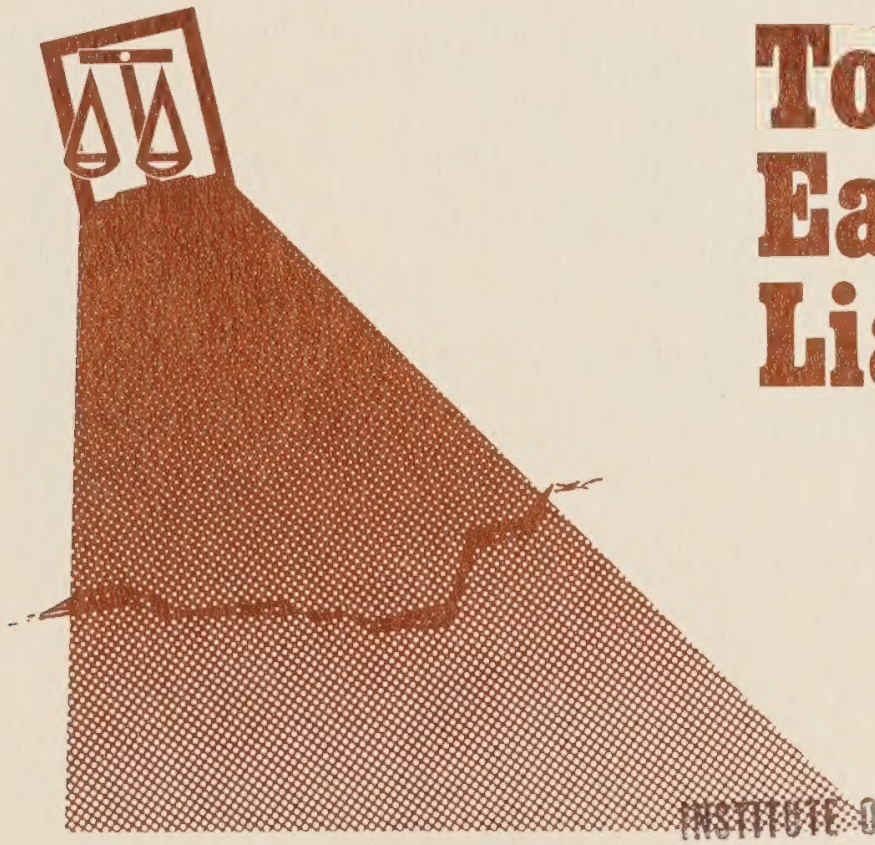
ATTORNEY'S GUIDE



To Earthquake Liability

By John G. Evans
May 1979

ASSOCIATION
OF BAY AREA
GOVERNMENTS
ABAG

Association of Bay Area Governments*

Earthquake Liability Study**

Project Advisory Committee

Robert Brown, Jr.
U.S. Geological Survey

Professor Winfred Carter, Member
Utah Seismic Safety Advisory Council

Henry Dengenkolb, President
H. J. Dengenkolb and Associates

Louise Giersch, Vice Chairman
California Seismic Safety Commission

John H. Larson, County Counsel
County of Los Angeles

James E. McCarty, President
American Public Works Association

Thomas K. McGuire
Deputy Attorney General
State of California

Professor Arnold Meltsner (Chairman)
Graduate School of Public Policy
University of California

Will J. Perry, Jr., Member
California Seismic Safety Commission

H. R. Pulley, Coordinator
Earthquake Programs
California Office of Emergency Services

Professor Arvo Van Alstyne
College of Law
University of Utah

Project Consultants

Professor Gary Schwartz
UCLA Law School

Drossler Research Corporation
(Survey Consultants)

ABAG Staff

Terry Margerum, Project Director
John G. Evans, Legal Counsel
Jeanne Perkins, Regional Planner III
Donald Olmstead, Manager,
Earthquake Programs
Dave Brinkerhoff, Planning Aide

Report Credits

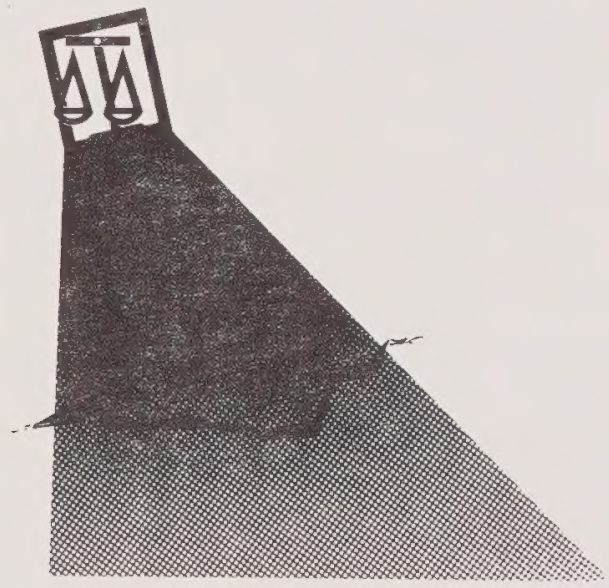
Text: John G. Evans
Design: Don Olmstead
Graphics: Ross Turner

---

*ABAG is the Council of Governments for the nine-county San Francisco Bay Region with a membership of 90 cities and 7 counties.

**This report and the Earthquake Liability Study were made possible by a $125,000 grant from the National Science Foundation. Any opinions, findings, and conclusions or recommendations expressed in this publication are those of the author and do not necessarily reflect the views of the National Science Foundation.

ATTORNEY'S GUIDE



To Earthquake Liability

By John G. Evans
Legal Counsel,
Association of
Bay Area Governments

May 1979

This report describes the findings and recommendations of a study of local governments' potential liability for injuries from earthquake-related hazards. The study was conducted by the Association of Bay Area Governments (ABAG) under a grant from the National Science Foundation.

The study's primary legal consultant was UCLA School of Law Professor Gary T. Schwartz, a consultant to the California Citizens Commission and the California Joint Legislative Committee on Tort Liability. The ABAG study was advised by a panel of experts in law and earthquake-related fields. Notable among the legal experts were: Professor Arvo Van Alstyne of the University of Utah; John H. Larson, Los Angeles County Counsel; and, Thomas K. McGuire, Deputy Attorney General, California.

ABAG

Table of Contents

Attorney's Guide to Earthquake Liability

The ABAG Earthquake Liability Study was carried out at the suggestion of local governments. At a 1976 meeting of ABAG member governments, local officials expressed concern over potential liability for earthquake hazards. They stated that liability rules were inhibiting local efforts to reduce earthquake hazards. A common perception was: the more local governments do about earthquake hazards, the more liable they become. ABAG was instructed to investigate this liability problem.

Prior to initiating the Earthquake Liability Study, ABAG confirmed the existence of the problem through consultations with experts. They revealed that, while an earthquake remains an "act of God," its effects on people and structures might not be so classified. This comes about as a result of scientific and technical advances. These advances joined with expansions in governmental liability give rise to the potential earthquake liability which is the subject of this paper.

Advances in structural engineering and construction techniques make it possible to build earthquake-resistant structures and to rehabilitate older structures, reducing their vulnerability to seismic damage. Improved geological information regarding fault zones, landslide areas, and poor soil conditions make it possible to avoid hazardous areas or to use them more carefully. Before this century ends, the developing science of earthquake prediction may provide specific, advanced information

regarding the time, place and intensity of earthquakes.

In recent years, local governments have experienced an expanding tort liability. This has resulted in part because of new substantive bases for liability (for example, the "special relationship" rules of Tarasoff v. University of California Board of Regents, 17 C3d 425, 131 Cal. Rptr. 14, 551 P2d 334 (1976) and Mann v. State, 70 CA3d 773, 139 Cal. Rptr. 82 (1977)--also applying the "undertaking doctrine"). Courts have applied the oft reiterated Doctrine that "where there is negligence, the rule is liability, immunity is the exception." Johnson v. State, 69 C2d 782, 798, 73 Cal. Rptr. 240, 447 P2d 352 (1968).

The volume of tort claims has also expanded rapidly. In Los Angeles County the claims filed against the County increased from 1,853 in 1975 to 2,863 in 1977. The California Citizens' Commission on Tort Reform (see Note 1) found that filings of non-automobile tort claims are growing seven to fifteen times faster than the State's population. Given this rising litigiousness and increased capacity to deal with seismic problems, local governments may reasonably expect suits for earthquake-related injuries.

The Earthquake Liability Study began in January, 1978. Its purposes were to:

1. clarify the nature and extent of local governments' liability for earthquake hazards;

2. advise local governments how to cope with that liability; and,

3. recommend ways that tort law could be changed to encourage local governments to reduce earthquake hazards without increasing their liability.

The Earthquake Liability Study included three major tasks. These were:

1. To clarify local government liability. Professor Gary T. Schwartz of UCLA prepared a report assessing relevant California, Washington, Alaska, New York and Federal tort rules. His report serves as a basis for much of this paper.

2. In-depth on-site interviews were conducted at five locations which had experienced damaging earthquakes in the last fifteen years: Anchorage, Alaska (1964); Seattle, Washington (1965); Santa Rosa, California (1969); Oroville, California (1975); and San Fernando-Los Angeles, California (1971). Ventura County, California was visited because of an emerging earthquake hazard-liability controversy.

3. A mail survey was sent to nearly 400 local public officials (including attorneys, chief administrative officials and elected officials) in 88 jurisdictions in four states.

The site visits and survey provided information regarding local governments' understanding of liability rules and the interaction between the rules and earthquake hazards.

One caveat deserves mention. While this report discusses issues of potential liability, it does not concede that liability exists. The lack of earthquake case precedents and other legal uncertainties precludes a definitive statement regarding liability. In an earthquake liability case, many defenses could and would be raised by local government attorneys. This document is not intended to detract from those defenses. However, in recognition of continuing incursions into the deep (and increasingly uninsured [see Note 2]) pockets of local governments, this report is made in the spirit of "forewarned is forearmed."

After brief review of relevant tort statutes, this report will summarize the Earthquake Liability Study's legal findings. The findings center on certain specific areas of concern:

Duty, Dangerous and Defective Conditions of Public Property, Earthquake Prediction and Warning, Discretionary Immunity, Uncertainty, and Disincentives. The Study findings, while primarily derived from the rich California body of law and experience, may be applicable in other earthquake-prone states. Some issues and findings identified in this report may have relevance to other natural disasters and for local government tort liability in general. Reported also are the Study's recommendations on how to deal with and accommodate to potential liability for earthquake hazards.

Brief Overview of Tort Statutes

(see note 3)

The Earthquake Liability Study was focused on the law of five major jurisdictions: California, New York, Washington, Alaska, and the United States. The detailed statutory law (all citations to "Government Code" are to the California Statute) and relatively well developed case precedents in California provided the richest sources of information. Following is a brief overview of the pertinent statutory law of each of these jurisdictions.

The California Tort Claims Act (Government Code §§810, et seq.) establishes a basic rule of governmental liability for negligence subject to certain immunities. Public employees are liable in the same manner as other private persons would be (Government Code §820). Local governments are subject to the same rule of vicarious liability for employees as private employers (Government Code §815.2). In addition local governments are subject to direct liability for failure to discharge a mandatory duty (Government Code §815.6) and

where public property in a dangerous condition results in injury (Government Code §835). Public employees sued for torts commited in the course and scope of employment are entitled to a defense and indemnity by the local government (Government Code §825).

The California Tort Claims Act sets forth a general rule of immunity for "discretionary" acts (Government Code §§815.2, 820.2). In addition, there are specific immunities (for example, Government Code §820.4, Law Enforcement; §§818.2, 821, Law Adoption and Enforcement of Enactment; §§818.4, 821.2, Permits or Licenses; §§818.6, 821.4, Inspection; and, §§818.8, 822.2, Misrepresentation).

The Federal Tort Claims Act imposes vicarious liability on the federal government for torts of its employees (28 USC §1346) and creates immunity for discretionary acts and a number of intentional torts. The State of Washington abolished sovereign immunity but has no comprehensive tort claims act. Draft legislation sponsored by Washington public entity attorneys has been introduced which would create new immunities for permit issuance, inspections, and the design of certain public facilities. Washington courts recognize a discretionary immunity. Washington Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P2d 440 (1965).

The State of New York waived sovereign immunity in 1929 but no comprehensive tort claims act has been enacted. In 1962, Alaska waived sovereign immunity by statute (§9.50.250). Alaska has a discretionary immunity. By amendment to the Alaska Statute in 1977 a

number of specific immunities have been added to cover: inspections, failure to abate health or safety violations, permit issuance or denial, extraterritorial services, and emergency activities. (§9.65.070)

Findings and Recommendations to Local Governments

Duty

"Duty" (see Note 4) is an element of the proof in a negligence cause of action. There is a generally recognized duty of due care not to expose others to an unreasonable risk of harm. This "duty" concept does not include a legal responsibility to rescue others from peril (unless there is a special relationship or some responsibility for creating the peril). "Duty" may be extended in scope under certain circumstances. Duties not found in common law may be imposed upon local governments by legislative mandate. Further, a local government may by its own action voluntarily undertake duties it was not previously required to discharge (e.g., to warn of an earthquake).

The existence of "duty" may be anticipated as an issue in earthquake liability cases. Since public entities have no general duty to protect

against earthquake injuries, the following discussion is limited to specific situations where duty may be created. These are: duty created by enactment (mandatory duty) and duty created by undertaking (affirmative duty). Rules relating to public property are discussed in another portion of the report.

Mandatory Duty

In connection with "Duty", tort law recognizes a rule of negligence per se which, when applicable, facilitates proof of liability. For local governments, the doctrine could be stated as follows: a local government's failure to conform to duties imposed upon it by statute designed to protect against a risk and injury which have occurred to a plaintiff establishes negligence per se.

The California Tort Claims Act codifies a concept like negligence per se in Government Code §815.6, as follows:

> "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

Recent court decisions have expanded mandatory duty liability. In Morris v. County of Marin, 18 C3d 901, 136 Cal. Rptr. 251, 559 P2d 606 (1977), the county was held liable for a worker's injuries sustained on a private construction job where the county had failed to require proof of worker's compensation insurance before issuing a building permit as mandated by statute.

Prior to Morris, local governments were thought immune from tort liability based upon issuance of permits (see Note 5) or failure to enforce a law (see Note 6). Breaking new ground, the California Supreme Court held in Morris that the "permit" immunity would not insulate against mandatory duty liability unless the permit decision was "discretionary." In effect, the court ruled that the county had no discretion not to require proof of the mandated insurance. A similar interpretation was given to the "failure to enforce" immunity. The court in Morris distinguished the "inspections" immunity, (see Note 7) stating in dicta that it would remain inviolable against mandatory duty liability.

Local Enactments

What official action is an "enactment" that can trigger the mandatory duty rule? Government Code §810.6 defines "enactment" to mean a "constitutional provision, statute, charter provision, ordinance or regulation." In this connection the Law Revision Commission comment to §810.6 states:

> "This definition is intended to refer to all measures of a formal legislative or quasilegislative nature. 'Regulation' is defined in §811.6 to carry out this intent more fully." (Emphasis added [see Note 8].)

From these definitions it appears that "enactment" may include an ordinance or regulation of local governments.

Elson v. Public Utilities Commission, 51 CA3d 577, 124 Cal. Rptr. 305 (1975), forebodes that

a public entity's own enactments may be a basis of mandatory duty liability for the public entity. In Elson the State P.U.C. violated its own order requiring revocation of a regulated common carrier's permit where the carrier failed to secure liability insurance. The plaintiff secured an uncollectible tort judgment against the negligent carrier and, in turn, successfully imposed liability on the state for the judgment under the mandatory duty rule. In Morris (supra, at p. 914), the California Supreme Court indicated its general approval of Elson. Thus, it appears by slight extension that a local government's own enactments may create mandatory duty liability for itself.

Liability Disclaimer

There is some authority that mandatory duty liability may be disclaimed. Where a statutory enactment imposes a duty upon a public entity but also exculpates the entity from liability, such a legislative disclaimer has been held to preclude mandatory duty liability. Brock v. State, 81 CA3d 752, 146 Cal. Rptr. 716 (1978) [see Note 9]. In Brock, plaintiffs were injured in a catastrophic fire-explosion. They filed suit against the state alleging violation of a mandatory duty under Cal/OSHA to inspect the premises where the mishap occurred. The court found that a mandatory duty existed but held that an all encompassing exclusion against the use of the safety statute in third-party actions precluded liability. (Id., at p. 719 [see Note 10]). If a local ordinance can create "mandatory duty" liability, it is

reasonable under Brock that a disclaimer of liability in the local ordinance may be effective as well.

* * *

The impact of the mandatory duty rule in earthquake liability cases may be significant. Not only may a local government fail to discharge statutory duties imposed from above, but it may fail to meet duties created by its own ordinances. Liability could be the result. Consider the following hypothetical: A city with a five year old ordinance requiring abatement of identified dangerous building appendages (e.g., parapets or cornices), has done very little to carry out its program. Persons injured in an earthquake by falling parapets would probably have a mandatory duty cause of action. In litigation the city might not be able to raise either the "permit" or "failure to enforce" immunities.

Another portentous example of mandatory duty liability is provided in the recently decided Winmar v. City of Marysville (see Note 11). Winmar, an apartment tenant, was trapped in a fire that broke out during his sleep and traveled up two unenclosed stairwells, cutting off escape. He suffered serious burns, some requiring plastic surgery. There was no operable fire extinguisher in his building and no fire alarm system. A fire hose in the building burst when filled with water. The City Fire Department had inspected the building regularly prior to the fire and was aware of the hazards that prevented Mr. Winmar from escaping injury. The city had adopted the 1971 Uniform Fire Code and the 1970 Uniform Building Code, including an Appendix I, making code

requirements concerning stairwell enclosures, self-closing doors, fire walls and fire escapes applicable to pre-existing, noncomplying buildings like the one where Winmar resided. The code gave the city authority to abate substandard structures as nuisances.

In awarding several hundred thousand dollars to plaintiffs, the court held in Winmar that once the city had undertaken to inspect and knew of the substandard conditions, it had a mandatory duty to enforce the building code. The court concluded correctly that the city would have been immune against liability if it had merely failed to inspect or had negligently inspected the building. From a liability perspective in Winmar the city was safer doing nothing rather than acting (see Note 12).

Recommendation - Ascertain and Fulfill Duties

LOCAL GOVERNMENTS SHOULD ASCERTAIN AND FULFILL STATUTORY OR MANDATORY DUTIES IMPOSED UPON THEM BY HIGHER LEVELS OF GOVERNMENT OR BY THEIR OWN ORDINANCES AND REGULATIONS.

DISCUSSION:

Over one-half of the attorneys surveyed by ABAG stated that local officials did not understand liability for mandatory duties imposed by enactment.

Both state and local enactments should be considered in following this recommendation. In state statutes and regulations, areas of possible concern would be state-mandated building codes (in California: see the Riley Act, Health and Safety Code §§19100, et seq., and regulations) and state-mandated earthquake provisions (in California: see, the Alquist-Priolo Special Studies Zone Act, California Public Resources Code, §2621 et seq.). Local ordinances of possible concern would include: building codes with required minimum standards; nuisance abatement requirements; safety ordinances mandating certain actions; building certification and permit requirements; and land-use or environmental ordinances imposing restrictions on the use of land.

LOCAL GOVERNMENTS SHOULD EXERCISE CAUTION IN ADOPTING ENACTMENTS THAT CREATE DUTIES.

Discussion:

Local governments should not impose duties upon themselves that cannot or will not be fulfilled. To avoid imposing duties in their own enactments, local governments may wish to consider the following drafting suggestions:

1. Mandatory language (for example, "shall") should be avoided. As an alternative to mandatory language, the local government could empower itself to do certain things (without requiring action). The language of ordinances could be permissive (for example, "may").

2. An expression of legislative intent that no duty is created by the enactment will aid later court interpretation.

3. The ordinance could include a disclaimer or exclusion of liability.

4. The ordinance should be framed so as to extend its benefits and protection to the population in general and should avoid targeting a specific group for benefits (see Note 13).

Absent some special relationship or circumstance, a local government has no affirmative duty to aid or rescue others from a peril or risk of harm that the local government has not created. However, if a local government undertakes to give aid or rescue, it may be liable for its negligence even though no duty was initially present. Liability would be imposed under the rule of §323 of the Restatement of Torts 2d which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon such undertaking.

In Brown v. MacPherson's, Inc., 86 Wash. 2d 293, 545 P2d 13 (1975), the court imposed liability based on the undertaking doctrine set forth in §323. In Brown, the State had promised to give an avalanche warning, something it ordinarily had no duty to do. The State's negligence in performing its undertaking increased the risk of harm and resulted in injury to those in the area where the avalanche occurred. Adams v. State, (see Note 12), is an Alaska Case holding based upon the undertaking doctrine. [See also, Indian Towing Co. v. United States, 350 US 61 (1955).] In California, the undertaking doctrine was recently applied in the decision of Mann v. State, supra. [See also, Tarasoff v. University of California Board of Regents, supra, a case finding a duty to warn based upon special relationship.]

Local governments should exercise caution in creating affirmative duties through their non-legislative actions. Such duties, if not properly discharged, may be the basis of tort liability. For example, a local government has no duty to give an earthquake warning based upon earthquake predictions. However, if a local government were through public announcement to undertake voluntarily to give such warnings, an affirmative duty could arise and with it potential liability.

Dangerous Conditions of Public Property

Dangerous conditions of public property are a significant source of potential earthquake liability for local governments. The jurisdictions studied present a varied picture in their treatment of public property cases.

California has codified specific rules concerning liability for injuries caused by public property defects and immunity for public property design decisions. Washington, Alaska and New York have applied general negligence principles in public building cases. In cases involving public facility design, some federal precedents apply principles of discretionary immunity. New York case law recognizes a design immunity. Weiss v. Fote, 7 NY2d 579, 167 NE2d 63, 200 NYS2d 409 (1960). Washington and Alaska courts have not dealt with design immunity questions.

The California Tort Claims Act contains a number of interrelated provisions concerning liability for injuries caused by public property. Government Code §835 (see Note 14) establishes a rule of direct liability:

> "...for injury caused by a dangerous condition of its property if...the property was in a dangerous condition at the time of the injury,...the injury was proximately caused by the dangerous condition, [and]...the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred..."

"Dangerous Condition" is defined as:

> "...a condition of property that creates a substantial (as distinguished from minor, trivial, or insignificant) risk of injury (see Note 15) when such property is used with due care in a manner in which it is reasonably forseeable that it will be used."
> [Government Code §830(a)]

Before liability attaches, it must be shown that the local government was on notice (actual or constructive) of the dangerous condition sufficiently in advance to have taken protective measures, or that the dangerous condition was created by public employee negligence occurring within the scope of

employment. (Government Code §835.) If the case is based upon an allegation of constructive notice, this may be rebutted with proof that the local government maintained a reasonably adequate inspection system that failed to disclose the defect. [Government Code §835.2(b) (1).]

Recommendation - Inspection

LOCAL GOVERNMENTS SHOULD HAVE A REASONABLE INSPECTION SYSTEM TO INFORM THEM WHETHER THEIR PUBLIC PROPERTIES ARE SAFE.

Discussion:

Some local governments feel no incentive to inspect their properties because inspection may give actual notice of defects or be too expensive. They may be overlooking the constructive notice rule which dictates that local governments may not necessarily avoid liability by failing to acquire actual notice.

Cost-Benefit Balancing

Where a dangerous condition of public property is proven, liability may be rebutted by showing that the local government's acts or omissions were reasonable. In California, a special defense is available to public entities under Government Code §835.4 which provides for cost-benefit balancing as a means to determine the reasonableness of a local government's acts.

Where the alleged dangerous condition was created by public employee negligence or wrongful act or omission, reasonableness is:

> "...determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury." [Government Code §835.4(a).]

On the other hand, where liability would be based upon the local government's notice (actual or constructive) of the alleged dangerous condition:

> "the reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury." [Government Code §835.4(b).]

The defense provided in Government Code §835.4 may be particularly useful. In this post-Proposition 13 era of local government limitation, the Law Revision Commission Comment to §835.4 has taken on a special relevance.

> "This defense has been provided public entities in recognition that, despite limited manpower and budgets, there is much that they are required to do. Unlike private enterprise, a public entity cannot often weigh the advantage of engaging in an activity against the cost and decide not to engage in it. Government cannot 'go out of business' of governing. Therefore, a public entity should not be liable for injuries caused by a dangerous condition if it is able to show that under all the circumstances, including the alternative courses of action available to it and the practicability and cost of pursuing such alternatives, its action in creating or failing to remedy the condition was not unreasonable." (Approved Law Revision Commission Comment to Government Code §835.4.)

The cost-balancing defense is important to local governments confronted with decisions regarding earthquake-hazardous public properties. In making a reasonable determination, a local government is allowed an opportunity to offset the magnitude of the uncertainty and the risk of harm against the present utility of its property and the cost of

protective measures. A cost-balancing defense will have greater credibility if supported by an advance, policy-level decision considering countervailing risks and benefits, rather than an after-the-fact rationalization to avoid liability.

Normally the issues raised by Government Code §835.4 will be a matter for the jury. [De la Rosa v. City of San Bernardino , 16 CA3d 739, 749, 94 Cal.Rptr. 175 (1971). For a case applying §835.4, see Cardenas v. Turlock Irrigation District, 267 CA2d 352, 73 Cal.Rptr. 69 (1968).]

Adjacent Private Property

Public property may be made "dangerous" by a condition of adjacent private property. Jordan v. City of Long Beach, 17 CA3d 878, 95 Cal. Rptr. 246 (1971) illustrates how far this principle may be extended. In Jordan the plaintiff alleged that she received injuries after stepping in a hole and tripping over a protruding water pipe. While both the hole and the pipe were located on private property, they allegedly made the adjacent city right-of-way dangerous. The Jordan court held that a cause of action had been stated.

The rule determining liability is whether the condition of adjacent private property ". . . created a substantial risk of harm to persons generally who would use the public property with due care in a foreseeable manner." (Id., at p. 883.) In the earthquake context, this rule could result in local government liability for injuries sustained in the public right-of-way because of cornices, parapets or

buildings falling from adjacent private property.

Recommendation - Adjacent Private Property

LOCAL GOVERNMENTS SHOULD BE AWARE THAT PUBLIC PROPERTY MAY BE DANGEROUS IF ADJACENT PRIVATE PROPERTY (E.G., PARAPETS, CORNICES OR STRUCTURES LIKELY TO FALL IN AN EARTHQUAKE) EXPOSES THOSE USING THE PUBLIC PROPERTY TO SUBSTANTIAL RISK OF INJURY.

Discussion:

If such conditions exist, the appropriate level of response may be determined in California by a cost-benefit analysis under Government Code §835.4. Local government should also consider whether to give warning. [See generally, Johnson v. State, 69 C2d 782, 786, 73 Cal. Rptr. 240, 447 P2d 352 (1968).]

Design Cases

With increasing knowledge about structural design and earth sciences, we may anticipate suits against local governments based upon injuries sustained in an earthquake because of a defective design or plan of public property.

The jurisdictions studied show two varied approaches to immunity in public facility design cases. In federal decisions, the discretionary immunity has been applied in some instances to insulate a design or plan from liability [United States v. Ure, 225 F2d 709 (9th Cir., 1955)]. In other cases, design decisions have been considered merely "operational" and nondiscretionary [American Exchange Bank v. United States, 257 F2d 938 (7th Cir., 1958); Stanley v. United States, 347 F. Supp. 1088 (D. Maine, 1972)].

A second approach has been the creation of a specific design immunity such as that found in the California statute. [Government Code §830.6 (see Note 16).] This rule protects against liability if:

(a) the plan or design of the public property was approved in advance by the local government legislative or other body or employee exercising discretionary authority; and

(b) substantial evidence shows that the approval was reasonable (for example, it was in accordance with then-accepted standards of design).

The intent of the California design immunity was to prevent post facto second-guessing of plans and designs of public structures and improvements. Somewhat contrary to legislative intent, the scope of the rule has been narrowed by the courts. Cameron v. State, 7 C3d 318, 102 Cal. Rptr. 305, 497 P2d 777 (1972) held that the design immunity is effective only if the specific design feature under attack was considered by the local government in approving the public facility design. Even where design immunity bars liability, under Cameron a local government may still be liable if it has negligently failed to warn the public of a continuing dangerous condition of its public property (Id, at p. 329).

Baldwin v. State, 6 C3d 424, 99 Cal. Rptr. 145, 491 P2d 1121 (1972), holds the design immunity ineffective if "changed conditions" subsequent to the original design approval demonstrate a substantial danger in the design. While some attorneys regard Baldwin as applicable only to highway cases, there is nothing in the case suggesting that it is limited to its facts.

The breadth of the "changed condition" rule is uncertain. Would information that a local

government facility rests astride a newly discovered earthquake fault qualify as a "changed condition"? The answer is not known. It is apparent from Baldwin that something less than a physical change in a public improvement may be a "changed condition." Baldwin, for example, merely involved a change in the way a public improvement was used: a substantial increase of traffic flow making a highway facility hazardous.

It has been held that changes in the Uniform Building Code creating new standards for building safety are not sifficient to establish "changed conditions." Thomson v. City of Glendale, 61 CA3d 378, 132 Cal. Rptr. 52 (1976). In sum, since Baldwin, local governments have an ambiguous, but continuing responsibility for their design decisions that tends to devalue the design immunity.

Recommendation - Design Immunity

LOCAL GOVERNMENTS SHOULD BE FAMILIAR WITH THE DESIGN IMMUNITY RULE AND ITS LIMITATIONS.

DISCUSSION:

Upon discovery of "changed conditions," a local government may be able to balance costs and benefits and, as an alternative to taking immediate and costly remedial measures, take lesser measures without tort liability. [See Government Code §835.4; Miller v. City of Burbank, 25 CA3d 249, 102 Cal. Rptr. 559 (1972), vacated on other grounds, 8 C3d 689, 106 Cal. Rptr. 1, 505 P2d 193 (1973); Baldwin v. State, supra, at p. 436.]

Earthquake Prediction and Warning

Credible earthquake predictions that are narrowly focused in time, location and intensity will soon be possible. Are there liability implications for local governments?

An affirmative conclusion was reached by the California State Legislature when it adopted SB 1950 (Government Code §955.1) as an emergency measure in 1976. The intent of the bill was to:

> "ensure that appropriate actions [respecting earthquake predictions] were taken in the public interest by governmental agencies without fear of consequent financial liabilities when acting in a responsible manner under such circumstances to assure public safety."
> [Government Code §955.1 (a), clarification added.]

No other states have legislated on this subject.

SB 1950 added little, if anything, by way of new immunities for California public entities. Government Code §955.1(b) specifically immunizes only the governor's decision to issue or not to issue an earthquake warning. Without enactment of SB 1950, such a decision, whether made by the governor or local policymakers, would almost certainly have been immunized by the general discretionary immunity in Government Code §820.2. No other immunities are created for state or local governments by §955.1.

Because SB 1950 fell far short of its declared mark, local governments should be aware of its limitations. The following discussion will address this and some other implications arising from earthquake prediction and warning: negligence in evaluation and fact-gathering preceding prediction; warning or failure to warn of a prediction; and, acts or omissions in responding to an earthquake warning.

Fact Gathering and Evaluation

Does §955.1 insulate negligence in fact-gathering or evaluation antecedent to an earthquake warning? Professor Schwartz, in his assessment of California law, suggests that notwithstanding SB 1950, negligence in fact-gathering or evaluation preceding a decision to issue or not to issue an earthquake warning may be actionable.

Although SB 1950 is silent on this issue, the legislation purports to confine application of the discretionary immunity as follows:

> "[t]his legislation is not intended to provide immunity for government officials and other government employees acting in a nondiscretionary capacity from liability for injuries arising out of ordinary negligence." [Government Code §955.1(a)]

Under these circumstances it is uncertain whether the discretionary immunity will reach back to insulate negligent fact-gathering or evaluation preceding an earthquake warning decision.

This conclusion is reinforced by Connelly v. State, 3 CA3d 744, 84 Cal. Rptr. 257 (1970), a flood prediction case, which held that:

> "...the determination to issue flood forecast is a policymaking function, a discretionary activity within the scope of governmental immunity, while gathering, evaluating and disseminating flood forecast information are administrative and ministerial activities outside the scope of government immunity. Consequently, the question whether these unprotected acts were performed negligently must be determined from the facts of the case."
> (Id. at p. 751 clarification added)

Under Connelly fact gathering and evaluation are considered ministerial and hence not

subject to discretionary immunity. The same result could be expected in an earthquake warning case unless it is determined that the immunity narrowly conferred upon the governor reaches back to cover negligence preceding his decision.

In a suit based upon negligent fact-gathering or evaluation preceding an earthquake warning, the misrepresentation immunity provided by Government Code §§818.8 and 822.2 would not aid the defense. In Connelly, as in Johnson v. State, supra, the misrepresentation immunity was limited to interferences with financial or commercial interests. The immunity provided no protection against liability for negligent flood prediction (Connelly, supra, at p. 752). A similar result should be anticipated in an earthquake warning case.

Failure to Warn

What would be the outcome in a case alleging that a local government negligently failed to warn of an earthquake? At least two lines of defense can be anticipated. Just as the decision to issue an earthquake warning would be discretionary, so the decision not to issue such a warning should be equally discretionary and enjoy an immunity in all the jurisdictions studied. An issue of duty would also be presented. The local government could defend on the basis that tort law imposes no affirmative duty on public entities to issue earthquake warnings. This is so because a local government is not obliged to protect others from harms (including harms arising in the natural environment) not caused by it.

Under aggravated facts, a local government might be held to have undertaken an affirmative duty to issue earthquake warnings. If so, negligence in discharging the undertaking could result in liability. For example, if a local government publicly committed itself to issue an earthquake warning should the need arise, and if the public relied on that commitment to its injury, a cause of action could be framed. The theory of the case would rest on §323 of the Restatement of Torts (2d) (supra, at p. 12).

Recommendation - Discretionary Immunity

EARTHQUAKE WARNING DECISIONS SHOULD BE MADE IN A MANNER THAT MAXIMIZES APPLICABILITY OF THE DISCRETIONARY IMMUNITY.

(See the discussion on discretionary immunity.)

Emergency Response

What are the liability implications of local governments actions taken in response to an earthquake warning? Liability and immunity will be determined by the general provisions of the Tort Claims Act. SB 1950 provides no new immunities for measures, emergency or otherwise, taken by state or local governments in response to an earthquake warning. Although applicable to earthquake occurrences, the immunities of the California Emergency Services Act (Government Code §8550, et seq.) do not appear to extend to the imminency of an earthquake. [See §8558 (b) and (c) defining "emergency."]

Discretionary Immunity (see note 14)

All jurisdictions studied recognized a discretionary immunity. The discretionary immunity, if understood and properly utilized, may protect against liability for some governmental decisions made in response to earthquake hazards.

Generally, the discretionary immunity (which derives from the doctrine of separation of powers) applies to the policymaking and planning levels of government but not to operational or ministerial functions. Dalehite v. United States, 346 US 15 (1953); Johnson v. State, 69 C.2d 782, 73 Cal. Rptr. 240, 447 P2d 352 (1968). It is commonly held that while a policy decision may be immune as discretionary, activities implementing the decision may be considered ministerial and, as a result, enjoy no immunity. Adams v. State, 555 P2d 235 (1976-Alaska); Johnson v. State, at p. 795.

A decisionmaker's rank or position may affect applicability of the discretionary immunity. Decisions of high-ranking executive officials with general policymaking responsibilities are more likely to be immune than those of lower echelon operational or ministerial functionaries (see Dalehite and Johnson, supra).

Even though a decision may involve considerable professional or scientific expertise, this will not make the decision "discretionary" and immune. Standing alone, professional or scientific judgments lack the governmental-policymaking character prerequisite to the discretionary immunity. Tarasoff v. University of California Board of Regents, 17 C3d 425, 131 Cal. Rptr. 14, 551 P2d

334 (1976); Griffin v. United States, 500 F2d 1059 (3d Cir., 1974).

The California discretionary immunity is worded:

> "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of discretion vested in him, whether or not such discretion be abused." (Government Code §820.2, emphasis added.)

Because of the emphasized language, it is held that for a decision to be discretionary, decisionmaker must have "...consciously considered the risks to plaintiff and determined that other policies justified them." (Johnson v. State, supra, at p. 794.) In other words, the local government must show that a conscious balancing of risks and advantages took place. It is neither sufficient nor even relevant that the decisionmaker normally engaged in "discretionary activity if the employee did not render a considered decision." (Id., at p. 795.)

Recommendation - Policy Level Decisions; Consideration of Risks and Benefits

> **DECISIONS REGARDING EARTHQUAKE-RELATED HAZARDS SHOULD BE MADE AT A HIGH POLICY LEVEL. WHERE A DECISION WOULD CREATE OR CONTINUE A RISK OF INJURY, THERE SHOULD BE A CONSCIOUS AND KNOWING CONSIDERATION AND ASSUMPTION OF SUCH RISK IN ORDER TO GAIN OTHER POLICY OBJECTIVES AND BENEFITS.**

Discussion:

> To be covered by the discretionary immunity, decisions regarding earthquake hazards should be made, preferably, by elected or top administrative officials in an exercise of their general policymaking responsibilities. If some risk will exist after the decision, the decision should be made after creating a public record of

consideration of countervailing risks and benefits.

By way of example, assume the following facts: A city contracted with a local private hospital to provide emergency medical services to indigent persons brought in by the city's police ambulances. The next nearest hospital facility to the city is inconveniently distant (20 miles). The City is under no legal duty, statutory or otherwise, to contract for or provide such medical care. The city does not in any sense operate or have any authority to maintain the private hospital.

Geological trenching in a nearby development reveals that the hospital is located very close to a newly discovered fault capable of large earthquakes. A study of the hospital determines that it would be badly damaged by a quake on that fault. The hospital, an older structure, is "grandfathered in" under all applicable State seismic safety/structural statutes and regulations and is not required to make any structural rehabilitation or modifications. All this is known to the city prior to contracting.

What result when the inevitable earthquake occurs? The city is sued for negligence in exposing plaintiffs to the seismic hazard in the hospital. Plaintiffs are persons brought in by the city police ambulance and who were injured by the hospital's collapse during the earthquake.

If the city council consciously considered the earthquake risk and potential for injuries as against the need for emergency treatment to the public and assumed these risks in its decision to contract with the hospital, then the discretionary immunity should prevent liability. On the other hand, if the city council made its decision to contract without consideration of such risks because the city engineer in his professional judgment thought that the risk, although known to the city, was slight and decided on his own to minimize it or not report it to the council, then the discretionary immunity might not apply.

If the local government has a risk management program, decisions about earthquakes should be integrated with this program. Risk management, when incorporated into the policymaking process, can help to establish the kind of careful consideration of risks and benefits crucial to the success of the discretionary immunity.

Uncertainty — Awareness of the Issues

In his report to ABAG, Professor Schwartz concludes that:

> "the liability of public entities in California and elsewhere suffers from a high degree of uncertainty. Insofar as the law is uncertain, one cannot realistically expect parties to arrange their behavior so as to satisfy legal requirements."

This conclusion was affirmed in ABAG on-site interviews of local government officials.

The ABAG mail survey determined that 96% of local officials believe tort law is so unpredictable it is difficult to know the liability implications of their decisions. Their attorneys agree: over one-half the attorneys surveyed indicated that local officials do not understand some important legal concepts, (for example, discretionary immunity, liability for mandatory duties, limitations on design immunity, or the extent of liability for misrepresentation).

The causes of this uncertainty are both procedural and substantive. Professor Schwartz identifies one as "rule uncertainty". This is created by significant ambiguities as to what the rule of tort law is in a given situation. For example, it is uncertain whether or not a local government is liable or immune where injuries result from issuance of a certificate of occupancy as a consequence of a negligently conducted inspection which failed to uncover a code violation. Preceding discussion has underscored other rule uncertainties: Can a local government's own enactments create mandatory duties? What are "changed conditions" for purposes of the design immunity rule?

Another cause of confusion in tort law is a high degree of "application uncertainty." The concept of reasonableness which is central to the California Tort Claims act and to the rule of negligence is an excellent example. While the flexibility of a reasonableness standard facilitates case-by-case adjudication, it may be difficult to ascertain its effective meaning in specific situations.

The effect of rule and application uncertainty is heightened by procedures for adjudicating tort claims. Tort litigation occurs after-the-fact. A local government cannot seek an advance judicial declaration whether certain conduct will be reasonable or not. Determinations of negligence and reasonableness are often rendered by a jury. Indeed, rule (and application) uncertainty may not be resolved until a case is decided and rules are defined (or created) on appeal for the first time, with substantial liability or immunity hanging in the balance. [See, for example, Tarasoff v. Regents of the University of California, supra; Baldwin v. State, supra; Morris v. County of Marin, supra.] For the most part, rule, application and procedural uncertainties are not readily susceptible to local solutions, but they may be amenable to legislative remedy. Recommendations in this vein are made in the latter part of this report.

Uncertainty also derives from local officials' unfamiliarity with legal concepts. For this reason it is not surprising that the issue of potential liability for earthquake hazards has not occurred to most local governments. Only one-third of the officials surveyed saw liability as a possible problem (see note 17).

Education of local officials can reduce legal uncertainty arising from their ignorance about the law.

Recommendation - Education

LOCAL GOVERNMENT POLICYMAKERS AND ADMINISTRATIVE OFFICIALS SHOULD BE FAMILIAR WITH MAJOR PRINCIPLES OF TORT LAW.

Discussion:

This could be accomplished through periodic seminars concerning governmental liability, regular review and discussion of pending liability suits, and periodic discussion of important statutory changes and court decisions. If the local government has a risk management program, liability implications of different proposals could be analyzed and considered in advance of decisionmaking.

This recommendation has particular importance for the growing number of jurisdictions which, due to increased liability insurance costs, have become self-insured. They are, more than ever, dependent upon their own devices to avoid costly liability suits and judgments.

As an example, a "feel" for negligence rules and legal processes would help to allay the intimidation that results from the local officials' uncertainty about the law. In this respect nothing would serve better than an appreciation of the "reasonableness" concept. Many local officials need to know that the concept focuses on local government behavior and not solely upon results of action or inaction.

They need to know that there may be more than one "right" or reasonable solution or response to a problem. A simplified explanation of "reasonableness" is that a local government with responsibility for a potential risk must make an effort to assess its alternative courses of conduct and then arrive at a rational solution under the circumstances. The assessment of alternatives can include weighing the potential probability and severity of injury against the value of the local government activity and cost of adequate precautions.

Disincentives

The ABAG Earthquake Liability Study began because local governments perceived tort law as a disincentive to earthquake hazard reduction. Are these disincentives real or merely a matter of perception? They are both. For example, to the extent that local governments are inhibited by legal uncertainties, the disincentives can be both real and perceived.

One basic objective of tort law is to encourage safe conduct. While the ABAG study did not find that this objective is pervasively frustrated by tort law disincentives, a few rules were identified that may inhibit hazard reduction.

Under California law, a local government does not become liable for dangerous conditions of public property in some instances until it has actual notice. Because actual notice can trigger liability exposure and fiscal problems, it may be a disincentive to local government inspection programs that would provide information about dangerous conditions. As a consequence, to avoid actual notice, some major California jurisdictions do not inspect public property.

There are also disincentives relating to "duty." Because noncompliance with local enactments may result in liability under neglience per se or mandatory duty rules, local governments may avoid enacting ordinances imposing definitive requirements. ABAG encountered instances of jurisdictions actually rewriting ordinances to eliminate potentially mandatory requirements. Another disincentive arises from the undertaking rule of §323 of the

Restatement of Torts (2d). Because tort law does not (absent a special relationship or circumstance) impose an affirmative duty to aid or rescue others from harm, local governments may have a strong reason to avoid voluntary programs to help, aid, assist or prevent harm to their citizens. Examples of the possible disincentive effects of duty rules are provided in preceding discussion (see Winmar v. City of Marysville, supra, at p. 10; Adams v. State, supra, [see Note 12].)

Many public attorneys interviewed by ABAG were concerned with the unfairness of the joint and several liability rule to local governments. Their complaint was that this rule encourages tort suits against local governments as attractive, collectible defendants.

Some states have adopted a rule of comparative negligence which requires determination of proportional fault. This concept has not been extended so as to affect joint and several liability among concurrent tortfeasors (see Note 18). Thus, although it has only minimal responsibility for an injury, a local government found liable, can, under the joint liability rule, be required to satisfy an entire judgment with its only recourse being a hollow right of contribution from the inadequate insurance and/or assets of codefendants. For example, in Winmar, supra, the city was forced to pay a lion's share of the judgment which far exceeded the apartment owner's insurance and assets.

Elimination of joint liability for local governments in comparative negligence states would not burden the courts as they are already required to determine proportional fault.

In an earthquake, many potential liability scenarios involve local governments in concurrent tortious conduct. Examples are: negligent building permit issuance cases, negligent failure to enforce mandated building standards, and dangerous adjacent private property cases. Many such cases will arise from substandard structures with underinsured owners of small means who are unable to contribute their share of a judgment. To saddle local governments with joint liability under such circumstances seems unfair and could provide a clear disincentive: it may be safer to do nothing than to risk the broad liability attending even a relatively small error.

Recommendations to State Governments

Recognizing that local governments are not masters of their own liabilities, the ABAG Earthquake Liability Study with the aid of its review panel has prepared recommendations to state governments to alleviate some of the problems identified in the study. The recommendations are aimed at:

1. Reducing the uncertainty (real or perceived) about the liability consequences of certain actions;
2. Elimination of some disincentive;
3. Encouraging earthquake hazard reduction without increasing liability.

The recommendations are discussed in the following sequence: Legislation regarding Public Property, Private Property and Earthquake Warning and Prediction; Clarifying Opinions from State Attorney General; and, State Matching Grants for elimination of dangerous conditions in certain public structures.

Legislative Recommendations

Legislation should be enacted to clarify legal ambiguities, reduce tort law disincentives, and encourage earthquake hazard reduction. Major facets of this legislation would be:

Dangerous Conditions of Public Property

A. Hazard Identification and Reduction; Immunity

The state would be required to notify local governments if they are located wholly or partly within an area of significant

seismic risk. Prior to notice local governments would be immune from liability for injuries caused by an earthquake due to dangerous conditions of public property. After notice:

1. Local governments not in an identified area of seismic risk would remain immune.

2. Local governments which are located in a seismic area would retain immunity if within a specified time they inspected public properties for earthquake hazards and adopted a local plan to mitigate identified hazards and, thereafter, remain in reasonable compliance with the plan.

Intended Impact - reduce uncertainties about potential liability and encourage identification and mitigation of public property earthquake hazards.

B. Proportionate Liability

The legislation would provide that where a local government is held liable for injury sustained in an earthquake due to a dangerous condition of public property caused by the condition of adjacent private property (i.e., a private parapet falling on a public sidewalk), the local government's liability would be limited in direct proportion to its share of the negligence causing the loss.

Discussion:

This would abandon the rule of joint liability of concurrent tortfeasors.

Intended Impact - reduce disincentives by discouraging irresponsible claims against the "deep pocket" of local government.

Hazardous Private Property

A. Rehabilitation of Older Structures

To encourage voluntary rehabilitation and improvement of older buildings, the legislation would provide that local governments may adopt an "earthquake life safety standard" less rigorous than the currently applicable building code. Its primary purpose would be to reduce personal injuries in such buildings, not to minimize property damage. A local government would have no liability for injuries sustained as a result of an earthquake in or because of such rehabilitated buildings by reason of the local government's adoption and enforcement of such life safety standards.

Note: The specific minimum standards for such a life safety code are to be those recommended by the California Seismic Safety Commission.

Intended Impact - encourage reduction of earthquake hazards in older, marginally economic buildings.

B. Clarification of Notice Rules

The legislation would provide that actual or constructive notice of a dangerous condition of private property cannot be a source of local government liability for injuries or loss caused by an earthquake unless:

1. **the injury was caused by a failure of the local government to comply with a statutory or mandatory duty; or**

2. **the injury occurred on public property which was dangerous because of a known dangerous condition of private property, e.g., private parapet falling on a public sidewalk.**

Intended Impact - reduce uncertainties (perceived) regarding potential liability

- reduce disincentives to local government discovery of earthquake hazards on private property.

C. Proportionate Liability

The legislation would provide that where a local government is held liable for injury sustained in an earthquake on private property, the local government's liability would be limited in direct proportion to its share of the negligence causing the loss.

Discussion:

This would abandon the rule of joint liability among concurrent tortfeasors in favor of a rule of several (proportionate) liability as to local government defendants.

Intended Impact - reduce disincentives by discouraging irresponsible claims against the "deep pocket" of local government.

Earthquake Prediction and Warning

A. **The legislation would provide that the state (see Note 19) and its agencies would be immune from liability for injuries, including injuries to commercial and business interests, caused by issuance or nonissuance of an earthquake warning or prediction; or any acts or omissions in the fact-gathering, evaluation and other**

activities leading up to issuance or nonissuance of such a warning or prediction.

B. The legislation would, based upon an official earthquake warning, provide the state and local governments with the immunities provided (see Note 20) in a declared State of Emergency.

Intended Impact - reduce uncertainties about potential liability

- reduce potential liability of local government

- reduce disincentives to a prompt and effective governmental performance in response to an earthquake prediction of warning.

Clarifying Opinion of State Attorney General

(California only)

The California State Attorney General would be requested to issue opinions clarifying the following legal uncertainties:

- Whether or not a local government's own enactments can impose mandatory duties upon the local government and/or other public entities located within its jurisdiction.
- Whether or not new information received by a public entity about earthquake hazards to public property can constitute "changed circumstances" within the rule of Baldwin v. State, supra.

State Grants for Long-Term Capital Improvement

Appropriate state agencies should examine the feasibility of a long-term capital improvement program to reduce earthquake hazards in certain public structures and facilities. These would include high occupancy structures, lifelines, buildings occupied involuntarily or by partially dependent populations (e.g., schools, hospitals, jails, courthouses), and critical or emergency facilities.

Through matching grants, the state would provide 75% funding. To provide an opportunity for identification and reduction of hazards without fear of liability, local governments would be immune for a specified period (ten years, for example) from liability for injuries sustained as a result of an earthquake if the local government was making reasonable progress towards reducing earthquake hazards in such structures during the specified period.

Intended Impact - accelerate reduction of earthquake hazards in public structures.

Conclusion

There are areas of significant potential earthquake liability. These relate primarily to dangerous conditions of public property or failure to adequately discharge duties either mandated or voluntarily undertaken. Liability for earthquake warnings is relieved partially by the discretionary immunity, but new immunities should be considered, especially for governmental emergency-response activities. The discretionary immunity may provide significant protection if properly utilized.

Local governments are subject to some uncertainties about legal effects of their actions some of which may be reduced by education. There are disincentives to earthquake hazard reduction: some are merely perceived while some disincentives are real.

There are strategies available to state and local governments to counter the potential of earthquake liability, clarify legal uncertainties, reduce disincentives, and encourage hazard reduction without increased liability.

NOTES

1. California Citizens' Commission; Righting the Liability Balance, Chapter 6, p. 132.

2. The financial pressure of constantly increasing insurance premiums is working a revolution on local government liability insurance practices. Many local governments are becoming self-insuring and some are instituting risk management programs.

3. For a 50-state survey of tort statutes, see Appendix B, The New World of Municipal Liability, April, 1978, published by National League of Cities, 1620 Eye Street, N.W., Washington, D.C. 20006.

4. The breadth of "duty" in catastrophes is a difficult issue. Common law courts have expressed concern over negligence liability for "an indeterminate amount for an indeterminate time to an indeterminate class." Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931, Cardozo, C.J.)

   In recognizing and extending the duties of public entities the California courts have sometimes engaged in a balancing of various public policy objectives. See Tarasoff v. Regents of University of California, 17 C3d 425, 131 Cal. Rptr. 14 (1976). This precludes any prediction of the outcome on Duty issues in an Earthquake Liability Case.

5. Government Code §818.4 provides an immunity regarding "permits and licenses" as follows:

   > "A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked."
   >
   > (See also Government Code §821.2.)

6. Government Code §818.2 provides a "law adoption and enforcement of law" immunity as follows:

   > "A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law."
   >
   > (See also Government Code §821.)

7. Government Code §818.6 provides an "inspections" immunity as follows:

> "A public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than its property (as defined in subdivision (c) of §830), for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety."
>
> (See also Government Code §821.4.)

8. The term "regulation" means:

> "... a rule, regulation, order or standard, having the force of law, adopted by an employee or pursuant to authority vested by constitution, statute, charter or ordinance in such employee or agency to implement, interpret, or make specific the law enforced or administered by the employee or agency."
> (Government Code §811.6, emphasis added.)

9. On the general issue of duty, there is a similar implication in Washington law that liability based upon a duty imposed by a local government ordinance may be precluded by a disclaimer in the ordinance. [See Campbell v. City of Bellevue, 85 Wash. 2d 1, 530 P2d 234 (1975).]

10. The statutory exclusion against liability was worded as follows:

> "It is the intent of the legislature that the provision of this division [Cal/OSHA] shall only be applicable to proceedings against employers pursuant to the provisions of Chapter 3 (commencing with 6500) and 4 (commencing with 6600) of Part I of this division for the exclusive purpose of maintaining and enforcing employee safety.
>
> Neither this division nor any part of this division shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action arising after the operative date of this section, except as between an employee and his own employer."
> (California Labor Code §6304.5.)

11. This Sutter County Superior Court case (No. 20653) decision was not appealed for fear of further solidifying the legal trends noted above. Information was provided by insurance defense counsel.

12. A disincentive was noted after an Alaska Supreme Court decision in a similar case, Adams v. State, 555 P2d 235 (1976). In that hotel fire case, there had been a faulty fire alarm system, exposed wood framing, and improper storage of combustible materials. The State Fire Marshall had inspected, knew of the

conditions, but had not taken action as required by statute to post the building or require abatement of the hazard. The State claimed in defense that it had no "affirmative duty" to the hotel occupants who were killed or injured. The court rejected this argument. Liability was based upon the "undertaking doctrine" (see infra p. 12).

Perhaps the policy of the undertaking doctrine justified the result in Adams, but there was an unexpected side effect. Alaska local governments considered Adams a compelling disincentive. They immediately sharply curtailed fire inspection activities so as to minimize liability.

13. Some cases (particularly those in Washington and New York) have been resolved in favor of or against local governments by determining whether the duty owed as a result of an enactment was a duty to the public in general or to a specific individual or group. [See Halvorson v. Dahl, 89 Wash. 2d 673, 574 P2d 1190 (1978); Whitney v. City of New York, 27 AD2d 528, 275 NYS2d 783 (1966).]

14. The general discretionary immunity provided in Government Code §820.2 is inapplicable in dangerous and defective condition cases. Hill v. People, 154 Cal.Rptr. 142 (1979). [See also, Van Alstyne, California Governmental Tort Liability (Cont. Ed. Bar, 1964), at p. 577; Approved Law Revision Commission Comment to Government Code §835.]

15. The substantiality of risk of injury posed by an earthquake and the extent to which it is reasonably foreseeable would presumably be questions for the jury.

16. This rule derives from a similar New York rule. (See Weiss v. Fote, supra.)

17. An important exception was noted in jurisdictions which have recently experienced earthquakes. Most of these local governments have considered their potential liability and in some instances it has influenced their behavior. In Santa Rosa and Seattle, liability was one among several factors stimulating decisions to rehabilitate older downtown buildings. Concern over liability slowed redevelopment in some earthquake damage-prone areas of Anchorage, Alaska although that city seems less cautious now.

18. See, American Motorcycle Association v. Superior Court, 20 C3d 578, 146 Cal. Rptr. 182, 578 P2d 899 (1978).

19. In California this would mean the Governor and all members of the California Earthquake Prediction Evaluation Council.

20. See, for example, California Government Code §§8550, et. seq.; Civil Code §1714.5.

Other publications from ABAG's Earthquake Preparedness Program

Land Capability Analysis For Planning and Decision Making (February 1976)

Hazards Evaluation For Disaster Preparedness Planning (February 1976)

Regional Earthquake Safety Issues and Objectives (February 1977)

Earthquake Insurance Issues (September 1977)

Earthquake Intensity and Expected Cost (February 1978)

Legal References on Earthquake Hazards and Local Government Liability (December 1978)

Attorney's Guide to Earthquake Liability (February 1979)

ASSOCIATION
OF BAY AREA
GOVERNMENTS

ABAG

Hotel Claremont · Berkeley, California 94705